Supreme Court No. 81977-7
Court of Appeals No. 34995-7-II

IN
THE SUPREME COURT OF THE STATE OF WASHINGTON

LINDA EASTWOOD, DBA DOUBLE KK FARM, *Petitioner*

v.

HORSE HARBOR FOUNDATION, *Defendant,*
and
MAURICE ALLEN WARREN, a single person, and KATHERINE DALING AND MICHAEL DALING, husband and wife, *Respondents*

BRIEF OF AMICUS CURIAE HAROLD T. HARTINGER IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

I. INTRODUCTION

Identification of Amicus Curiae: Harold T. Hartinger, Pro Se Amicus Curiae, is now and since 1954 has been authorized to practice law in the State of Washington. A brief summary of his legal experience is attached as Appendix C, *infra* at 26. Amicus does not represent a client having an interest in the issues presented for review. No counsel for a party authored this brief in whole or in part, and no person or entity made contributions to Amicus to defray the expenses incurred in the research and preparation of this Brief.

Citation to Court of Appeals Decision: Division II of the Court of Appeals filed its unpublished opinion in *Eastwood v. Horse Harbor Foundation,* 144 Wn. App.1009, 2008 WL 1801332, on April 22, 2008. Petitioner Eastwood's Petition for Review was granted by order of the Supreme Court on January 7, 2009. A copy of the opinion is attached as Appendix A, *infra* at 19.

II. THE ISSUE ADDRESSED BY AMICUS

> Whether the "economic loss rule" bars a landlord's tort action for waste against agents of her tenant whose grossly negligent management practices damaged the landlord's reversionary interest in the leased premises?

The Court of Appeals bypassed questions about the scope of appellate review and reversed the judgment against the Managing Agents

for Ms. Eastwood's tenant, Horse Haven Foundation, without challenging the Findings of Fact and Conclusions of Law of the trial court. This Brief challenges the Court of Appeals' decision on the merits should the Supreme Court address them.[1]

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[1] The Managing Agents appealed trial court's judgment against them by inviting appellate court fact-finding to override trial court findings of "gross negligence" to which no error was assigned. The Agents' appeal raised no other issue.

Furthermore, nothing in the trial court's findings or legal conclusions – or in the briefs of the parties – identifies an overruled trial objection relating to the economic loss rule, agency law, or RCW 4.24.264 (interpreted as a limited defense against contract liability rather than tort liability).

The same was true of their appeal -- the Agents' briefs make no claim they raised these issues at trial – their Appellants' Brief did not assign error to any such rulings.

In light of the appellate record, an opinion of the Supreme Court that vacates the opinion of the Court of Appeals and reinstates the judgment of the trial court may better serve the public interest than would be served by addressing the merits of the arguments offered by Amicus in support of the trial court's judgment.

II: STATEMENT OF THE CASE

A. THE FACTS GIVING RISE TO MS. EASTWOOD'S TORT CLAIM AGAINST HER TENANT'S MANAGING AGENTS

The facts as hereafter stated are not in dispute as the case comes before the Supreme Court. They are based on the trial court's Findings of Fact and Conclusions of Law (CP 122-35) and Judgment (CP 136-37), the Eastwood/Foundation Lease (Ex 101), and testimony from Mr. Warren (RP Jan. 9, 2006 at 39-42).

Horse Harbor Foundation, a Washington nonprofit corporation, surrendered possession of farm premises leased from Linda Eastwood who then commenced suit against the Corporation and its Managing Agents (Allan Warren, Katherine Daling, and her husband Michael) for damages to the farm property attributable to negligent actions and omissions of the Managing Agents.

After a nine-day trial to the Court, the trial judge entered extensive Findings of Fact and Conclusions of law to support a Judgment against the Managing Agents making them jointly and severally liable with the Foundation for property damages attributable to their gross negligence but not their ordinary negligence.

The Managing Agents appealed the Judgment against them. They argued that the evidence may have established *ordinary negligence*, for which they had statutory immunity under RCW 4.24.264, but that it did not establish *gross negligence* that exceeded the protection

offered by the statute. Ms. Eastwood defended the trial court's factual findings and legal conclusions in support of her judgment against the Agents.

The Court of Appeals reversed the judgment without addressing the issues presented by the parties on appeal or at trial. The Court, on its own motion, ruled that (1) the "economic loss rule" barred a recovery for damage caused by Managing Agent's gross negligence, and that (2) "the economic loss rule also applies in these circumstances to bar individual liability for agents who may cause a principal's breach of contract."

1. Ms. Eastwood delivered possession of her Farm to Horse Harbor Foundation "in good order, repair, and in a safe, clean and tenantable condition."

Ms. Eastwood's Double KK Farm on Canyon Road (north of Poulsbo) was a well kept 14-acre farm dedicated to the boarding and care of horses at the time she delivered possession to the Foundation. *Ex 101; Lease Article V.* The Farm's spacious facilities were well designed to board at least 20 horses with ease.

The Farm premises included a large barn, paddocks, outbuildings, different sized shelters for horses, and fenced grounds for pasturage and riding. It also included an arena with size enough to provide riders and their horses a mostly covered area for equestrian training and rider instructions. The arena was complete with stalls for horses, and with an office, bathrooms, and a kitchen for the convenient use of owners and riders.

2. The Foundation surrendered possession of a farm in need of repair and rehabilitation to undo damages caused by negligence of its Managing Agents.

When title reverted to Ms. Eastwood she took possession of a farm property damaged to such an extent that it could no longer serve the purposes for which it was adapted. The Foundation had not maintained the premises with that standard of care required by the covenants of its lease. The Foundation's Managing Agents – its General Manager Allen Warren, its President and Kathleen Daling and her husband Michael, who worked with her, had failed to exercise ordinary care to protect Ms. Eastwood's property rights.

The role of Mr. Warren and the Dalings as Managing Agents had its inception in the Foundation's first dealings with Ms. Eastwood. Mr. Warren negotiated the lease terms and prepared the written lease. Mrs. Daling signed the lease after the Foundation's Board approved its terms. Mr. Warren and the Dalings continued their role as Managing Agents after the lease signing – they took charge of the daily on-the-grounds operations and activities.

3. The trial court awarded judgments against the Foundation to compensate Ms. Eastwood for her out-of-pocket labor and materials costs spent to repair and rehabilitate her Farm premises, its land, fixtures, and other amenities.

Ms. Eastwood spent $46,790.88 as her out-of-pocket labor and materials costs to repair and rehabilitate her damaged property. She was

awarded judgment against the Foundation for a portion of that sum ($43,800.88). The judgment amount represents the damages attributed to the Managing Agents' ordinary and gross negligence, it being implicitly conceded that the Foundation's imputed liability for its Agents' negligence was not limited by RCW 4.24.264. That sum, with an additional award for reasonable attorney fees ($44,762.75) and costs ($1,568.00) represented a total damage award against the Foundation of $90,131.63.

4. The trial court limited its judgment against the Managing Agents for the commission of waste to the damage caused by their gross negligence, not their ordinary negligence.

The trial court held the Managing Agents jointly and severally liable with the Foundation for that portion only ($32,850.66) of Ms. Eastwood's total property damage award ($43,800.88) against the Foundation. Its allocation restricted liability to that portion of the damages caused by their gross negligence. The reduced award reflected the statutory limitation on tort actions enjoyed by Managing Agents as directors and officers of a nonprofit corporation. See, App. B, *infra: RCW 4.24.264 Boards of Directors or officers of nonprofit corporations – Liability – Limitations.* (The trial court's classification of Mr. Warren as an officer or director was not challenged on appeal.)

B. THE RULINGS THAT REVERSED MS. EASTWOOD'S JUDGMENT AGAINST THE MANAGING AGENTS

The Court of Appeals reversed Ms. Eastwood's judgment against the Managing Agents based on issues raised *sua sponte* – none of which were addressed at trial or raised on appeal by the parties.

The Court of Appeals reversed Ms. Eastwood's judgment against Mr. and Mrs. Daling, Foundation Board Members, by ruling *(App A, infra at 21)*:

> The trial court interpreted RCW 4.24.264 such that a nonprofit director or officer would be individually liable where a breach of contract rose to gross negligence. The trial court misconstrued the applicable law. ... Because no exception to the economic loss rule applies here, the Dalings are not individually liable for damages to Eastwood under RCW 4.24.264 resulting from breach of contract.[2]

The Court reversed the judgment against Mr. Warren, a paid manager and not a board member, by ruling *(App A, infra at 22)*:

> Nothing in the record indicates that Eastwood was unaware she was bargaining the terms of the lease with a nonprofit corporation; in fact the record clearly shows otherwise. "[W]hen an agent makes a contract on behalf of a disclosed or partially disclosed principal whom he has power to bind, he does not thereby become liable for his principal's nonperformance." *Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc.*, 71 Wn.2d 679, 686, 430 P.2d 600 (1967). Eastwood cannot claim Warren is individually liable as an agent of HHF under these circumstances.

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[2] That the Court of Appeals resorted to legislative history to confirm the plain meaning of RCW 4.24.264 is not a contested issue. The contested issue is the Court's failure to recognize Ms. Eastwood's common law tort action for waste.

III. ARGUMENT FOR OVERRULING THE DECISION OF THE COURT OF APPEALS

A. THE TRIAL COURT DID NOT ERR BY ENFORCING MS. EASTWOOD'S COMMON LAW TORT ACTION FOR WASTE

Part III.A of this Brief addresses issues of property law, tort law, and agency law that support the trial court's judgment against the Managing Agents. Part III.B that follows rebuts the Court of Appeals' rulings for reversal.

1. A prohibition against "waste" is an inherent common law duty a tenant owes its landlord.

A lease is a conveyance of leasehold, a common law estate in land. It is an estate that gives the tenant a right to possession, limited in time, to land in which the landlord retains a reversionary right. When the tenant surrenders the leasehold estate to the landlord, full title to the premises reverts to the landlord. Stoebuck, William B. and Dale A. Whitman, *The Law of Real Property* §§ 6.10, 6.11 (3d ed. 2000),[3] (hereafter cited as Stoebuck, *Real Property*). .

The term "waste" describes the damage caused by a tenant's failure to treat the leased premises in such a way that no injury is done by the tenant through negligence or willful misconduct that prevents a return of the premises to the landlord as in the same general condition in which they were received, subject only to such general deterioration as is

[3] See, also, Stoebuck, William B., and John W. Weaver, 17 WASH. PRACTICE: *Real Property Law* § 1.2 (2004).

caused by a reasonable use and the lapse of time. *Moore v. Twin City Ice & Cold Storage Co.,* 92 Wash. 608, 159 Pac. 779 (1916); *Graffell v. Honeysuckle,* 30 Wn.2d 390, 398, 191 P.2d 858 (1948). See, generally, Stoebuck, *Real Property* § 6.23.

"Waste" as a common law property concept in this state derives its meaning (in all its formulations) from its purpose, as the *Graffell* description makes clear:

> "Waste," as understood in the law of real property and as variously defined by this court, is an unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession which results in its substantial injury. It is the violation of an obligation to treat that premises in such manner that no harm be done to them and that the estate may revert to those having an underlying interest undeteriorated by any willful or negligent act.

(The statutes construed by the *Graffell* court have been revised. See, RCW 4.24.630 and 64.12.020 *(App. B, infra at 24-25),* statutes that currently supplement a landlord's tort action for waste in much the same way as the earlier statutes did.)

The prohibition against "waste" is a duty inherent in the landlord-tenant relationship; it is a duty that exists independently of the lease creating the relationship. *Stegeman v. Burger Chef Systems, Inc.,* 374 So.2d 1130, 1131 (Fla. App. 1979); *Vollertsen v. Lamb,* 302 Or. 489, 493, 732 P.2d 486 (1987); Stoebuck, *Real Property* § 6.23.

Lease covenants may modify the common law prohibitions, as the Eastwood/Foundation does, and like all conveying instruments, the

modifications will be given effect, absent statutory restrictions or public policy objections, neither of which is present in the case before the court. See, *Preugschat v. Hedges,* 41 Wn.2d 660, 663, 251 P.2d 166 (1952); *cf. Graffell v. Honeysuckle,* 30 Wn.2d 390, 393, 191 P.2d 858 (1948). As to lease covenants generally, see Stoebuck, *Real Property* § 6.24.

The measure of damages for a lessee's commission of waste that constitutes a temporary and reparable injury is generally the cost of returning the premises to the condition required under the covenants of the lease. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 843-44, 726 P.2d 8 (1986). The general rule does not preclude compensation for lost rental or right of use or other losses which result from a negligent or wrongful act. See, e.g., *Burr v. Clark,* 30 Wn.2d 149, 158, 190 P.2d 769 (1948) (tort rule is the general measure of damage to property); *Riblet v. Spokane-Portland Cement Co.,* 45 Wn.2d 346, 274 P.2d 574 (1954) (property damage with award for nuisance); and *Colella v. King County,* 72 Wn.2d 386, 433 P.2d 154 (1967) (property damage and award for loss of use), later appeal 75 Wn.2d 953, 451 P.2d 667 (1969) (awards affirmed after trial).

2. Agents of a tenant cannot defeat a landlord's tort action for waste by asserting their agency relationship to the landlord's tenant.

An agent is liable for his or her own torts, including those committed while acting within the scope of the agent's authority. An agent's relationship to her or his principal is irrelevant to the party

injured by the tort. To put the matter directly, there is no defense against liability because the agent acted at the direction of her of his principal, or for the principal's account, or that no personal benefit was derived from the action. See, *e.g., Dodson v. Economy Equipment Co.,* 188 Wash. 340, 343, 62 P.2d 708 (1936); *Russell v. City of Grandview,* 39 Wn.2d 551, 556, 236 P.2d 1061, 1064 (1951), and *Northern Pac. Ry. Co. v. Tacoma Junk Co.,* 138 Wash. 1, 7, 244 P. 117, 119 (1926).

As we have seen in the state cases cited in the preceding paragraph, an agent is liable for his or her own torts without regard to his principal-agent or employer-employee relationship. This is the general rule in other jurisdictions. *See, e.g., Shivvers v. Hertz Farm Management, Inc.,* 595 N.W.2d 476, 480 (Iowa 1999); and *Shebester v. Triple Crown Insurers,* 826 P.2d 603, 630 (Okl. 1992). The Oklahoma Supreme Court opinion in *Shebester* explained the difference between the contract liability and tort liability of agents:

> Fn21. In *Bane v. Anderson, Bryant & Co.,* Okl., 786 P.2d 1230, 1234 (1990), we explained the general principles that distinguish agents' contract from their tort liability. One who commits a *tortious* act while acting as agent for another within the scope of his authority is individually liable. On the other hand, an agent is contractually liable *only when acting for an undisclosed principal. See Moran v. Loeffler-Greene Supply Company,* Okl., 316 P.2d 132, 137 (1957); *Osenbaugh v. Virgin & Morse Lumber Co.,* 173 Okl. 110, 46 P.2d 952, 954 (1935).

Shebester, 826 P.2d at 630 n.21.

B. THE COURT OF APPEALS OPINION CONFLATED FACTS AND LAW TO REACH A DECISION ABOUT THE ECONOMIC LOSS RULE THAT IS WITHOUT PRECEDENT IN THIS STATE OR ANY OTHER JURISDICTION

1. There is no merit in the ruling by the Court of Appeals that the Managing Agents were subject to breach of contract claim by Ms. Eastwood.

The Court of Appeals characterizes Ms. Eastwood's suit against the Managing Agents as a contractual claim subject to the economic loss rule:

> Here the parties had a contractual relationship in the form of a lease agreement. Further, Eastwood based her claims against Warren and the Dalings on a contractual theory of recovery: she sought economic losses (in the form of the cost to repair her property) resulting from HHF's actions[4] that led to damages and breach of the lease agreement. Thus the economic loss rule applies in this case.

Opinion; App. A, infra at 21. There is no mistaking the Court's characterization, albeit an erroneous one. Ms. Eastwood and the Managing Agents are the only parties to the appeal. Therefore, when the Court asserts that Eastwood's claims against the Agents were "based on a contractual theory of recovery" it can only be based on the assumption that the Agents owe contract obligations that parallel those of the Foundation. Furthermore, in the following paragraph the Court ruled

[4] To speak of "HHT's actions" is a bit of misdirection on the Court's part. The Foundation did not cause damage. The Managing Agents were the cause of the damages and the breach of the lease by the Foundation. The Foundation was strictly liable for its Agents' negligence under the well-known common law doctrine of respondeat superior. The Court's whole contract claim would fall apart if the Agents' actions had not been within the scope of their employment.

that it was the only the economic loss rule that protected Mr. and Mrs. Daling for their breach of the lease covenants:

> The trial court interpreted RCW 4.24.264 such that a nonprofit director or other would be individually liable where a breach of contract rose to gross negligence. ... Because no exception to the economic loss rule applies here, the Dalings are not individually liable for damages for Eastwood under RCW 4.24.264 resulting from breach of contract.

Opinion; App. A, infra at 21-23. But if we accept the view that the Dalings breached contractual obligations, what prevents an award of damages for the "breach of contract?"

Given the Court's premise, does it not follow that Ms. Eastwood is entitled to a judgment in accordance with the lease covenants but without the benefit of the limitations of RCW 4.24.264 that limits only tort damages? Such a judgment is fully justified by the lease covenants. See *Ex 101;* Lease, *Articles XII and XVII.*

Or are we to believe, given the Court's premise and its ruling, that the economic loss rule barred contractual remedies for breach of contract as well as tort claims?

2. The economic loss rule does not bar Ms. Eastwood's tort claim for waste in the absence of a contractual relationship with her tenant's Managing Agents.

The Court of Appeals cited no authority and offered no argument in support of its assumption that the Managing Agents were parties to the Eastwood/Foundation lease. If they were not parties, there was no

contractual relationship for Ms. Eastwood to enforce, and there is also no legal basis for invoking the economic loss rule.

I.

The economic loss rule is applied only when a plaintiff seeks damages beyond those available for a defendant's breach of contract. The rule serves no other purpose, as the Supreme Court's decision on *Alejandre v. Bull,* 159 Wn.2d 674, 153 P.3d 864 (2007), tells us:

"The economic loss rule applies to hold parties to their contract remedies when a loss potentially implicates both tort and contract relief." *Id.,* at 681.

"[T]ort law is not intended to compensate parties for losses suffered as a result of breach of duties assumed only by agreement." *Id.,* at 682 (internal quotation marks omitted).

"The economic loss rule maintains the fundamental boundaries of tort and contract law." *Id.,* at 682 (interior quotation marks omitted).

"[T]he purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists." *Id.,* at 683.

II.

Even in cases where there is an existing contract claim, the economic loss rule is not applied in every case. The rule does not bar "economic losses" that are attributable to fraud or intentional wrongdoing or personal injuries or property damage.

In the present case, the Court of Appeals ruled that Ms. Eastwood "based her claims on a contractual theory of recovery" and "sought economic losses" barred by the economic loss rule. *Opinion; App A, infra at 21.* The Court was not only mistaken about the theory of recovery,[5] it was also mistaken about the nature of the damage to Ms. Eastwood's farm. It was a property damage claim prosecuted by Ms. Eastwood as a tort action for waste.

Consider the facts: The Foundation took possession of the farm after signing a lease acknowledging it to be "in good order, repair, and in a safe, clean and tenantable condition." *Ex 101; Lease Article V.* The damage to the farm for which Ms. Eastwood sought recovery from the Managing Agents was caused by the Agents' gross negligence while acting as surrogates in possession of the farm on behalf of its corporate tenant. It was damage that constituted a breach by the Foundation of Lease covenants. *Ex 101; Lease Articles XII and XVII.*

Consider the consequences: To classify Ms. Eastwood's repair costs as an *economic loss,* as the Court of Appeals did, does nothing to protect contractual rights of Ms. Eastwood, the Foundation, or the Managing Agents. It serves only to free the Agents of all liability for their gross negligence.

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[5] See, Part III.B, *supra* at 12-13.

III.

If the economic loss rule is to be the tool of property law change, the Court of Appeal's decision is not persuasive precedent. Freeing surrogates for an impecunious corporate tenant of all responsibility for waste created by their gross negligence does not present a sympathetic case for an expansion of the economic loss rule.

During an 18 or 19-month period[6] the Foundation's Managing Agents" *gross negligence, over and above damage caused by their ordinary negligence,* damaged the leased premises to the extent that required repair costs ($32,850.66) were more than double the monthly rental received during the life of the lease.

If the Supreme Court looks beyond the present case to formulate an extension of the economic loss rule, it needs first to examine the existing state of real property law. Stoebuck, *Real Property,* provides a ready-made summary of the law:

> Chapter 4. Relations Between Owners of Present and Future Estates and Interests in the Same Realty or Personality, at 146 et seq.
> Chapter 5. Concurrent Ownership of Realty and Personalty, at 175 et seq.
> Chapter 6. Landlord and Tenant, at 242 et seq.

[6] The lease was executed on October 1, 2003; litigation commenced on June 25, 2004; the Foundation surrendered possession "almost a year later." *Opinion, App. A, infra at 21.*

3. There is no merit in the Court of Appeals reliance on *Griffiths v. Bayly*[7] as precedent for reversing the Ms. Eastwood's tort judgment against Mr. Warren, a paid employee but not an officer or board member of the Foundation.

The Court of Appeals "economic loss rule" defense on behalf of Mr. Warren differed from the defense it provided the Dalings. They were members of the Foundation's Board of Directors. Mr. Warren was not a member. The Court reached the same result by ruling:

> As for Warren, the trial court found that agents and employees of nonprofit corporations may be liable for "misconduct which causes damage to persons or property." However true that may be for agents or employees under tort law, the economic loss rule also applies in these circumstances to bar individual liability for agents who may cause a principal's breach of contract. ... "[W]hen an agent makes a contract on behalf of a disclosed or partially disclosed principal whom he has power to bind, he does not thereby become liable for his principal's nonperformance." *Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc.*, 71 Wn.2d 679, 686, 430 P.2d 600 (1967). Eastwood cannot claim Warren is individually liable as an agent of HHF under these circumstances

Opinion, App. A, infra at 23. The ruling misstates facts. Mr. Warren negotiated the terms of the Eastwood/Foundation lease agreement, but Mrs. Daling, the President of the Foundation, signed the lease.

There is a second problem, one of law. No Managing Agent became a party to the Eastwood/Foundation lease, and thus subject to a breach of contract claim by Ms. Eastwood. The *Griffiths* says nothing at all about an agent's liability for his or her own tortuous conduct. In

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[7] **Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc., 71 Wn.2d 679, 686, 430 P.2d 600, 604 (1967).**

short, *Griffiths* has no relevance to the present case. The cases in support of an agent's tort liability are discussed above; *supra* at 10-11.

1. The opinion of the Court of Appeals decided issues not addressed during nine days of trial. It did so without stating the ends of justice served by excusing compliance with the governing appellate court rules and procedures; and it did so without citing any precedent for applying the economic loss rule to bar a tort action by a plaintiff against a defendant with whom the plaintiff has no contractual relationship.

The troubling aspects of the decision by the Court of Appeals are summarized in the three following paragraphs:

1. The Managing Agents' arguments for review invited appellate court fact-finding to override trial court findings of "gross negligence" to which no error was assigned. The Court of Appeals conducted no such review. Its opinion did not disclose the limited nature of the Managing Agents' appeal.

2. Nothing in the trial court's findings or legal conclusions – or in the briefs of the parties – identifies an overruled trial objection relating to the economic loss rule, landlord-tenant law, waste committed by a tenant or its agents, agency law, or the trial court's interpretation of RCE 4.24.264. The Agents' briefs on appeal made no claim they had raised these issues at trial or on appeal.

3. The trial court awarded Ms. Eastwood judgment against her tenant's Managing Agents by a successful prosecution of her common law tort action for waste caused by Agents' gross negligence. The Court of Appeals' *sua sponte* defense against liability for the Agents (the "economic loss rule") was predicated upon on (1) a mistaken view that

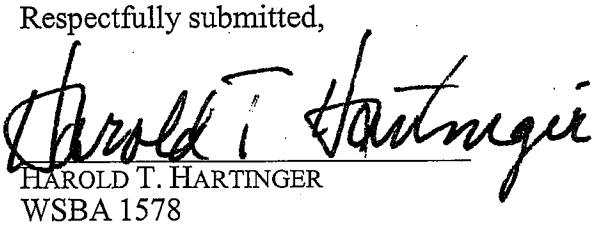
the agents were contractually liable personally for the property damage the caused, and (2) therefore that the "economic loss rule" barred individual liability, an equally mistaken view of landlord-tenant law and the law of agency.

IV. CONCLUSION

The opinion of the Court of Appeals should be overruled and its decision vacated (1) because it is contrary settled property law, and (2) because it cites no authority or argument to justify an abandonment or curtailment of existing property law that protects the rights of others who share an interest in the same property.

Dated this 2nd day of April 2009.

Respectfully submitted,



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APPENDIX A – Court of Appeals Opinion: ***EASTWOOD V. HORSE HARBOR FOUNDATION***

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

No. 34995-7-II
UNPUBLISHED OPINION

LINDA EASTWOOD, dba DOUBLE KK FARM, *Respondent,*
v.
HORSE HARBOR FOUNDATION, INC., a Washington Corporation and MAURICE ALLEN WARREN, a single man; KATHERINE DALING and MICHAEL DALING, husband and wife and the martial Community composed thereof,
Appellants.

Houghton, C.J. -- Horse Harbor Foundation, Inc. (HHF); Katherine and Michael Daling, HHF board members; and Maurice Allen Warren, HHF's manager, appeal the trial court's award of damages to Linda Eastwood based on their joint and several liability for damages arising from their gross negligence. We reverse.

FACTS

Eastwood has owned the Double KK Farm for more than 20 years. Double KK comprises approximately 14 acres and includes a large barn, many paddocks, outbuildings, horse shelters, turnout pastures, and a covered riding arena that includes stalls, an office, bathrooms, and a kitchen. The facility has been used as a breeding farm and commercial boarding facility and can house 20 horses if proper maintenance and management programs are used.

HHF, a nonprofit corporation, provides public education on horse care, cares for several abandoned and mistreated horses, and offers riding lessons, among other things. During the relevant period, Warren was the paid manager responsible for HHF's day-to-day affairs. Experienced in horse farm operations, he helped organize HHF and was responsible for the daily operations of HHF during the lease at issue here. The Dalings were HHF directors and officers during the relevant period. Under article III, section I of HHF's bylaws, the board of directors was responsible for managing HHF's affairs.

On October 1, 2003, HHF and Eastwood entered into a lease allowing HHF to occupy 10 acres of Double KK. HHF drafted the lease, which stated that HHF would "keep and maintain the leased premises and appurtenances in good and sanitary condition and repair" during the term of the lease. Ex. 101. Warren and the board of directors, including Katherine and Michael Daling, discussed the lease and "reviewed it together item by item" before entering into it. I Report of Proceedings (RP) at 43. Katherine Daling signed the lease, and she and Michael Daling participated in two meetings with Eastwood before the parties executed the lease. Eastwood set the rent below fair market value at $1,666.67 per month in exchange for HHF's agreement to maintain and repair the facility at its expense.

On June 25, 2004, Eastwood filed a complaint against HHF for unlawful detainer and alleging lease defaults due to lack of care of the premises. Almost a year later, HHF vacated the premises. After retaking possession and reviewing the premises, Eastwood shortly thereafter filed an amended complaint seeking, among other things, damages based on the Dalings' and Warren's individual liability.

After a bench trial, the trial court found "broad, persistent, and systemic failure" both in HHF's care of the Double KK facility and its horses. CP at 131 (FF 4). In turn, the trial court concluded that HHF breached its lease agreement by failing to properly maintain the leasehold.

The trial court decided that HHF employee Warren and HHF directors Michael and Katherine Daling committed gross negligence and were all individually liable for damages. The trial court allocated damages based on ordinary or gross negligence. With respect to damages caused by gross negligence, the trial court found all defendants jointly and severally liable for $32,850.66 in damages. The trial court also imposed joint and several liability against HHF, Warren, and the Dalings for $44,762.75 in attorney fees and $1,568.00 in costs.

The trial court denied their motion for reconsideration. They appeal.

ANALYSIS

Warren and the Dalings argue that the trial court erred in concluding that they committed gross negligence. The trial court imposed individual liability against Warren as an HHF agent or employee and imposed individual liability on the Dalings as directors under RCW 4.24.264.(fn1) That statute only allows individual liability for discretionary

decisionmaking of nonprofit directors and officers if the decision or lack thereof constitutes gross negligence. We reverse the trial court's imposition of individual liability on Warren and the Dalings because the statute does not apply here and the economic loss rule bars recovery.

> FN1. According to RCW 4.24.264, "a member of the board of directors or an officer of any nonprofit corporation is not individually liable for any discretionary decision or failure to make a discretionary decision within his or her official capacity as director or officer unless the decision or failure to decide constitutes gross negligence."

We review questions of law, including statutory construction, de novo. *City of Pasco v. Pub. Employment Relations Comm'n,* 119 Wn.2d 504, 507, 833 P.2d 381 (1992). Our obligation is to give effect to legislative intent and where a statute uses plain language, the statute is not ambiguous. *Regence Blueshield v. Office of Ins. Comm'r,* 131 Wn. App 639, 646, 128 P.3d 640 (2006). When faced with an unambiguous statute, we derive the legislature's intent from the plain language alone. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n,* 123 Wn.2d 621, 629, 869 P.2d 1034 (1994). Additionally, where the legislature prefaces an enactment with a statement of purpose, that declaration serves as an important guide in understanding legislative intent. *Hartman v. Wash. State Game Comm'n,* 85 Wn.2d 176, 179, 532 P.2d 614 (1975).

"[T]he purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses. If the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims." *Alejandre v. Bull,* 159 Wn.2d 674, 683, 153 P.3d 864 (2007). Here, the parties had a contractual relationship in the form of a lease agreement. Further, Eastwood based her claims against Warren and the Dalings on a contractual theory of recovery: she sought economic losses (in the form of the cost to repair her property) resulting from HHF's actions that led to damages and breach of the lease agreement. Thus, the economic loss rule applies in this case.

The trial court interpreted RCW 4.24.264 such that a nonprofit director or officer would be individually liable where a breach of contract rose to gross negligence. The trial court misconstrued the applicable law. In 1986, the legislature enacted RCW 4.24.264 as part of a larger purpose to make "general liability insurance" more affordable

for, among others, nonprofit organizations, in the hope that the legislative reforms would "increase the availability and affordability of insurance." Laws of 1986, ch. 305, §100. The legislature acted with an "intent . . . to reduce costs associated with the tort system." Laws of 1986, ch. 305, § 100 (emphasis added). Section 903 of the act created RCW 4.24.264.(fn2) Thus, the legislature intended RCW 4.24.264 to address tort liability of nonprofit directors and officers, not contract liability. Because no exception to the economic loss rule applies here,(fn3) the Dalings are not individually liable for damages to Eastwood under RCW 4.24.264 resulting from breach of contract.

> FN2. Pertinent to this matter, in 1987, the legislature amended RCW 4.24.264 the next year to replace "civilly" with "individually" and replace the phrase "act or omission in the course and scope of" with "discretionary decision or failure to make a discretionary decision." Laws of 1987, ch. 212, § 1101.

> FN3. Currently, Washington courts recognize only one possible exception to the economic loss rule. In Alejandre, 159 Wn.2d at 690 n. 6, our Supreme Court noted that other jurisdictions "recognize a broad exception to the economic loss rule that applies to intentional fraud." But the *Alejandre* court did not address whether the economic loss rule forecloses "fraudulent representation claims" because it resolved the issue before it on lack of substantial evidence of fraud. 159 Wn.2d at 690 n.6.

As for Warren, the trial court found that agents and employees of nonprofit corporations may be liable for "misconduct which causes damage to persons or property." However true that may be for agents or employees under tort law, the economic loss rule also applies in these circumstances to bar individual liability for agents who may cause a principal's breach of contract. Nothing in the record indicates that Eastwood was unaware she was bargaining the terms of the lease with a nonprofit corporation; in fact the record clearly shows otherwise. "[W]hen an agent makes a contract on behalf of a disclosed or partially disclosed principal whom he has power to bind, he does not thereby become liable for his principal's nonperformance." *Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc.*, 71 Wn.2d 679, 686, 430 P.2d 600 (1967). Eastwood cannot claim Warren is individually liable as an agent of HHF under these circumstances.

We reverse that portion of the trial court's ruling concluding Warren and the Dalings were jointly and severally liable as individuals for damages and attorney fees resulting from HHF's breach of the lease agreement.

ATTORNEY FEES

Eastwood seeks attorney fees on appeal. As she does not prevail under the contract on appeal, we decline to award attorney fees.

Reversed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, C.J.

We Concur:

Armstrong, J.

Van Deren, J.

APPENDIX B - Statutes

RCW 4.24.264. Boards of directors or officers of nonprofit corporations — Liability — Limitations

(1) Except as provided in subsection (2) of this section, a member of the board of directors or an officer of any nonprofit corporation is not individually liable for any discretionary decision or failure to make a discretionary decision within his or her official capacity as director or officer unless the decision or failure to decide constitutes gross negligence.

(2) Nothing in this section shall limit or modify in any manner the duties or liabilities of a director or officer of a corporation to the corporation or the corporation's members. [1987 c 212 § 1101; 1986 c 305 § 903.]

Notes: Laws 1987, ch. 212, § 1101, rewrote subsec. (1), which previously read: "(1) Except as provided in subsection (2) of this section, a member of the board of directors or an officer of any nonprofit corporation is not civilly liable for any act or omission in the course and scope of his or her official capacity unless the act or omission constitutes gross negligence."; and, at the end of subsec. (2), substituted "members" for "shareholders".

RCW 4.24.630. Liability for damage to land and property — Damages — Costs — Attorneys' fees — Exceptions

(1) Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

(2) This section does not apply in any case where liability for damages is provided under RCW 64.12.030, *79.01.756,79.01.760 , 79.40.070, or where there is immunity from liability under RCW 64.12.035. [1999 c 248 § 2; 1994 c 280 § 1.]

Reviser's note: RCW 79.01.756, 79.01.760, and 79.40.070 were recodified as RCW 79.02.320, 79.02.300, and 79.02.340, respectively, pursuant to 2003 c 334 § 554.

RCW 64. 12. 020. Waste by guardian or tenant, action for

If a guardian, tenant in severalty or in common, for life or for years, or by sufferance, or at will, or a subtenant, of real property commit waste thereon, any person injured thereby may maintain an action at law for damages therefor against such guardian or tenant or subtenant; in which action, if the plaintiff prevails, there shall be judgment for treble damages, or for fifty dollars, whichever is greater, and the court, in addition may decree forfeiture of the estate of the party committing or permitting the waste, and of eviction from the property. The judgment, in any event, shall include as part of the costs of the prevailing party, a reasonable attorney's fee to be fixed by the court. But judgment of forfeiture and eviction shall only be given in favor of the person entitled to the reversion against the tenant in possession, when the injury to the estate in reversion is determined in the action to be equal to the value of the tenant's estate or unexpired term, or to have been done or suffered in malice. [1943 c 22 § 1; Code 1881 § 601; 1877 p 125 § 606; 1869 p 143 § 555; 1854 p 206 § 403; Rem. Supp. 1943 § 938.]

APPENDIX C – Amicus Curiae

Harold T. Hartinger, Amicus Curiae, is now and since 1954 has been authorized to practice law in the State of Washington.

While on active duly with U.S. Army (1954 and 1955), he served overseas in Germany as legal advisor to a regimental commander.

In January 1956 Mr. Hartinger was appointed an Assistant Attorney General for the State of Washington. During his appointment, he served as Chief Counsel for the Commissioner of Public Lands and for each state entity for which the Commissioner served as the administrative head (*e.g.,* the Department of Public Lands and the Department of Natural Resource, its successor) and for each state agency of which the Commissioner was the administrative head or a member of a public agency (*e.g.,* the Harbor Line Commission, the State Capitol Committee, the State Oil and Gas Commission, the Bureau of Surveys and Maps, and a number of other agencies).

In March 1968 Mr. Hartinger joined Conrad, Kane, & Vandeberg, a Tacoma law firm, and a forerunner of the present Tacoma-Seattle law firm of Vandeberg Johnson & Gandara. He withdrew as a member of the Vandeberg firm in 2008 to devote full time to legal research, pro bono representation of clients, and occasional legal writing.

Mr. Hartinger is now and for more than 41 years has been admitted to practice before the U.S. Supreme Court, the U.S. Ninth Circuit Court of Appeals for the Ninth Circuit, and the U.S. District Courts for the Western and Eastern Districts of Washington. He has served as lead counsel in the trial of many cases in Washington's Superior Courts and the U.S. District Courts of this state.